

**Horizons Hotel Corporation, d/b/a Carib Inn Tennis Club and Casino and/or Hotel Associates, Incorporated and Union de Trabajadores de la Industria Gastronómica de Puerto Rico, Local 610, Hotel Employees and Restaurant Employees International Union, AFL-CIO. Case 24-CA-6726**

September 30, 1996

### SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND FOX

On June 11, 1996, Administrative Law Judge Peter E. Donnelly issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a cross-exception and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt his recommended Supplemental Order as modified.<sup>1</sup>

### ORDER

The National Labor Relations Board adopts the findings of the administrative law judge and orders that the Respondent, Horizons Hotel Corporation, d/b/a Carib Inn Tennis Club and Casino, and its alter ego, Hotel Associates, Incorporated, Hato Rey, Puerto Rico, its officers, agents, successors, and assigns, pay to Carmelo Rodriguez Fernandez the amounts set forth below.

1. The sum of \$24,428 as net backpay for the period ending October 31, 1995, plus interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and accrued to the date of payment, minus tax withholding required by Federal or state law.

2. A sum of money representing net backpay from November 1, 1995, until there is a valid offer of reinstatement, to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), including interest computed in the manner set forth above and minus tax withholding required by Federal or state law.

<sup>1</sup> We shall revise the Order to reflect the General Counsel's meritorious exception to the judge's failure to provide for additional backpay from November 1, 1995, until the proffer of a valid offer of reinstatement.

*Virginia Milan-Giol, Esq. and Efrain Rivera Vega, Esq.*, for the General Counsel.

*Wallace Vasquez Sanabria, Esq.*, of Hato Rey, Puerto Rico, for the Respondent.

*Ruben Davila*, of San Juan, Puerto Rico, for the Charging Party.

### SUPPLEMENTAL DECISION AND ORDER

#### STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. The discriminatee in the underlying unfair labor practice case, Carmelo Rodriguez Fernandez, was discharged by Horizons Hotel Corporation (Horizons) in April 1993. A hearing was held before Administrative Law Judge Michael O. Miller. Horizons failed to appear. Judge Miller, by Decision and Order dated December 14, 1993, ordered Rodriguez to be reinstated with backpay.<sup>1</sup> In the absence of exceptions, Judge Miller's Decision and Order was adopted by Board Order dated January 27, 1994. The Board Order was subsequently enforced by a U.S. Circuit Court of Appeals for the First Circuit on April 13, 1994.<sup>2</sup>

A dispute thereafter arose over the amount of backpay due to Rodriguez. Further disputed was the liability of Hotel Associates Incorporated (Associates) for the backpay remedy since Associates had not been named as a Respondent in the underlying unfair labor practice case.

A compliance specification was issued by the Regional Director for Region 24 on May 5, 1994, against both Horizons and Associates alleging, inter alia, "At all times during the relevant period herein, Respondent Hotel Associates has been a successor employer to, and alter ego of, and/or a single and/or joint employer with Respondent Horizons." Both Horizons and Associates filed answers to the compliance specification.<sup>3</sup>

A backpay hearing was held before me on November 13 and 14, 1995. Respondent Associates appeared at the hearing represented by counsel. However, Respondent Horizons did not appear. Neither Horizons nor Associates provided any of the documents or testimony from corporate individuals which had been sought by subpoena from the General Counsel. Briefs have been timely filed by Associates and the General Counsel, which have been duly considered.<sup>4</sup>

#### I. BACKGROUND

Since 1979, the Union has represented under contract a unit of service and casino employees at the Carib Inn, a resort hotel in Puerto Rico. On May 14, 1986, the Carib Inn was purchased at a bankruptcy proceeding by Horizons. On the acquisition of the hotel, Horizons refused to hire union employees of its predecessor. On the filing of unfair labor practice charges by the Union, the Board concluded that Horizons was a successor employer and that it had refused to hire its predecessor's employees and had refused to bargain

<sup>1</sup> *Carib Inn Tennis Club & Casino*, 24-CA-6726, JD-257-93.

<sup>2</sup> No. 94-1277.

<sup>3</sup> An amended compliance specification was introduced at the hearing to update the backpay figures.

<sup>4</sup> No opposition thereto having been filed, the General Counsel's "Motion Submitting Documents" is granted.

with the Union, conduct which violated Section 8(a)(3) and (5) of the Act.<sup>5</sup>

Associates, a separate corporate entity, began operations in June 1992. At that time, it took over the operation of the hotel with Horizons' employees. It was stipulated at the hearing that none of Horizons' employees were discharged at the time that Associates began operating the hotel. Ownership of the hotel was retained by Horizons.

On February 16, 1994, Horizons filed for Chapter 11 Bankruptcy in the U.S. Bankruptcy Court, Southern District of New York, and on March 30, 1994, Associates filed for Chapter 11 Bankruptcy in the U.S. Bankruptcy Court for the District of Puerto Rico. Both Horizons and Associates assert the pendency of these proceedings as jurisdictional defenses to the instant case.

## II. RODRIGUEZ' BACKPAY

The Board's Rules and Regulations provide that general denials are insufficient as a response to a compliance specification as to matters within the knowledge of the respondent.<sup>6</sup>

The answers filed by both Horizons and Associates were general denials and, as such, totally insufficient under Section 102.56(b) of the Board's Rules and Regulations. Nor was any probative evidence introduced at the hearing by Associates to dispute either the backpay figure or the formula used by the General Counsel to compute the backpay liability. Having reviewed all of the testimony and exhibits, I conclude that the Respondent totally failed to dispute any of the General Counsel's backpay computations at the hearing and that the backpay figure of \$24,428 through October 31, 1995, is correct. Having considered the matter in view of the entire record, I further conclude that the General Counsel's motion made at hearing and renewed in her brief that paragraphs 12 through 20 of the compliance specification be deemed admitted, has merit, and is hereby granted.<sup>7</sup>

## III. HORIZONS AND ASSOCIATES AS ALTER EGO AND/OR SINGLE EMPLOYER

### A. Facts

As noted above, Horizons purchased the hotel on May 14, 1986. Thereafter, in May 1992, there was created another corporate entity, Associates. The origin of Associates is murky, however it appears that it was formed pursuant to some sort of unwritten understanding that Associates would operate the hotel while ownership was retained by Horizons.

With respect to the matter of management, Articles of Incorporation from the records of the Puerto Rico Department of State disclose that Associates was incorporated on May

11, 1992. Horizons' attorney did the incorporation. A "Domestic Corporation Report" for the year 1992 discloses that Roberto Linderman was president, Jose Rodriguez was vice president, and Hernando Franco occupied the office of both treasurer and secretary. Both Linderman and Franco had been management employees of Horizons. Franco had been food and beverage manager for Horizons. He later became president of Associates and general manager of the hotel. Linderman had been hired originally by Horizons in 1991 as an accountant consultant and later worked as general manager in charge of operations. He assisted in the assumption of operations by Associates and became its comptroller. Another Associates employee, Personnel Manager Maria Borres, had occupied that same position with Horizons.

None of the Horizons employees were fired at the time of this change. Associates undertook the operations with Horizons employees. As noted above, Horizons also retained ownership of the hotel and all of its furnishings.

In about July 1993, the hotel, still owned by Horizons, was forced into foreclosure because of a judgment debt owed by Horizons to a law firm in the amount of \$43,717.15. A public auction was held. Associates purchased the judgment for the amount of the debt. Associates was the only bidder at the auction. Associates was awarded the property. However, no money was transferred and, since the judgment had been satisfied, Associates became the assignee of the judgment. It does not appear that title to the property was ever transferred from Horizons to Associates.

As noted above, Horizons did not appear at the hearing and Associates, while it appeared by counsel, presented no evidence and failed to produce any of the documents subpoenaed by the General Counsel. However, testimony provided by company officers at Federal bankruptcy proceedings disclosed certain relevant information.

Benito Fernandez, president of Horizons, stated in testimony taken in a deposition on April 19, 1994, in connection with its bankruptcy proceedings, that in 1992, because of Horizons' debts, it no longer wanted to operate the hotel and gave over the function of operating the hotel to Associates. However, Fernandez also testified that Horizons still owned the property and, in essence, that the agreement with Associates to operate the hotel in 1992 was voluntarily undertaken by Horizons. There was no agreement in writing but simply an understanding between Horizons and Associates which would continue until Horizons' debt problems were resolved, whereupon it expected to take back control of the property from Associates.

In this deposition, Fernandez also testified that Horizons had "no income, no expenses." Fernandez testified that Horizons' relationship with Associates was such that Horizons could reassume control of the operation at any time. Also, that any profits derived from Associates' operation of the hotel would be used to reduce Horizons' debt to secured creditors.

Further, since Associates began operating the hotel, it has attempted to negotiate with one of the creditor banks concerning a loan made to Horizons.

This deposition also discloses that prior to the award of the property to Associates at foreclosure auction in July 1993, Fernandez, in conversation with Franco and Linderman, asked that Associates bid on the property so that Horizons would have the option of purchasing the judgment

<sup>5</sup> *Carib Inn Tennis Club & Casino*, 312 NLRB 1212 (1993), enf. 49 F.3d 795 (1st Cir. 1995).

<sup>6</sup> "As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specifications or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures." Board's Rules and Regulations, Sec. 102.56(b).

<sup>7</sup> Board's Rules and Regulations, Sec. 102.56(c).

from Associates whenever they settled their debts. Fernandez testified that this option was not in writing, "just a verbal conversation," and that it had not been exercised up to the time of the deposition.

On September 2, 1994, testimony by Fernandez, at another bankruptcy proceeding, discloses that with respect to the incident underlying the unfair labor practice, i.e., Rodriguez' discharge, that it was Fernandez who called the shots even after Associates assumed operation of the hotel, when he decided that the underlying unfair labor practice case would not be defended because it did not make economic sense.<sup>8</sup>

### B. Discussion and Analysis

There is no single set of criteria which establishes an alter ego relationship. The Board will examine the total relationship in determining whether or not alter ego status exists. Among the factors considered by the Board are substantial identity of management, business purpose, operation, equipment, customers, supervision and ownership. The absence of any arm's-length relationship between the entities also suggests the existence of alter ego status. *NLRB v. Al Bryant*, 711 F.2d 543, 553-554 (3d Cir. 1983), cert. denied 464 U.S. 1039 (1984); *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402-404 (1960).

In the instant case, Horizons, upon acquiring the hotel in 1986, proceeded to violate the Act by refusing to hire the union employees of its predecessor and refusing to bargain with the Union as their representative.<sup>9</sup>

The operation experienced financial problems under Horizons' ownership and Horizons determined that another corporation should be established to manage the hotel. Thus Associates was created in May 1992. It is clear that no "arm's length" relationship existed between these two corporations. The primary officers, as well as the management of Associates, were Linderman, Horizons' general manager who became president and comptroller for Associates; Franco, Horizons' food and beverage manager, who became secretary and treasurer and general manager for Associates in the operation of the hotel; and Borres, personnel manager, who occupied the same position with Associates.

Associates hired none of its own employees and did not purchase any of the supplies or equipment belonging to Horizons. There appears to have been no substantial change in the operation of the hotel.

<sup>8</sup> As noted above, Associates took over the operation of the hotel in about June 1992. Rodriguez was discharged in April 1993.

<sup>9</sup> This unlawful conduct resulted in a presently unremedied Board and Circuit Court of Appeals Orders requiring Horizons to offer reinstatement and backpay with a potential liability of over \$5 million.

The record also discloses that profits earned by Associates from the management of the hotel would be used to reduce Horizons' debt.

Clearly, despite the fact that Horizons and Associates were separate corporate entities, Associates was created in order to shield Horizons from its debtors. Thus, when the hotel was auctioned off to satisfy a debt, it was Associates who purchased the judgment, put off the foreclosure, and allowed Horizons to retain title to the property. This would be difficult to fathom were it not for the fact that, as the record discloses, there was an understanding between Horizons and Associates that the judgment could later be purchased back by Horizons whenever its debt problems were resolved.

In short, I conclude that Associates was merely a disguised continuance, i.e., the alter ego of Horizons.

Associates also argues that since it was not named as a Respondent in the underlying unfair labor practice case, it cannot be held liable for the remedy in the instant backpay compliance proceedings.

However, Board precedent makes it clear that "issues of derivative liability for backpay may be litigated in supplemental proceedings even though parties alleged in such proceedings to be alter egos, to be part of a single employer relationship, . . . were not so alleged or named as parties in the underlying proceedings." *IMCO/International Measurement Co.*, 304 NLRB 738 (1991), enf. 978 F.2d 334 (7th Cir. 1992).

Having concluded that an alter ego relationship exists, I also conclude that service on Horizons constituted service on Associates since, as alter egos, they are substantially identical.<sup>10</sup>

### IV. BANKRUPTCY PROTECTION

The Respondent also contends that the pendency of federal bankruptcy proceedings operates as a stay to these Board proceedings. They do not. See *Shippers Interstate Service*, 618 F.2d 9 (7th Cir. 1980).

### Conclusions

On the entire record, I conclude that the total amount of backpay due to Carmelo Rodriguez Fernandez is the amount set out in the backpay specification, \$24,428.

[Recommended Order omitted from publication.]

<sup>10</sup> Based on this record, I also conclude that Horizons and Associates meet the Board's criteria for single employer status under the Act.